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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

DEFENDANT JAMES ARTHUR RAY'S RESPONSE TO STATE'S MOTION FOR RECONSIDERATION OF UNDER ADVISEMENT RULING ON MOTION IN LIMINE (NO.1) TO EXCLUDE EVIDENCE OF PRIOR ACTS PURSUANT TO ARIZ. R. EVID. 404(B) AND 403

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court has concluded that the State has not "established that the harm manifested by signs and symptoms associated with some pre-2009 sweat lodge participants was similar for purposes of Rule 404(b) analysis to the life-threatening and fatal conditions suffered by some participants in 2009." This Court further held that even "[a]ssuming that the Defendant was aware of the various signs and symptoms associated with pre-2009 participants, this knowledge would not constitute notice that he allegedly was subjecting these participants to a substantial and unjustifiable risk of death." Under Advisement Ruling on Defendant's Motion in Limine (No. 1), at 3. That legal conclusion is as correct today as it was when the Court issued its ruling on February 3, 2011. The State's motion for reconsideration should be denied.

As a preliminary matter, two procedural issues dispose of the State's motion. First, the State has not shown good cause to warrant reconsideration, and this Court should deny the motion for that reason alone. *See* Ariz. R. Crim. P. 16.1(d) ("Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered."). Arizona's rule limiting reconsideration "sets forth the simple principle that issues once determined by a court ought not, without a showing of good cause, be reconsidered by the same court or another of equal jurisdiction." *Id.* 16.1(d) cmt. No good cause exists here.

To the contrary, the State seeks the unusual action of reconsideration, and the forceful remedy of admitting prejudicial 404(b) material, without introducing *any* evidence, let alone evidence sufficient to meet its clear and convincing burden under *State v. Terrazas*. To the extent the State's argument mentions information it has not previously cited (without adducing actual evidence), the information was either readily available to the State at the time of the *Terrazas* hearing in November 2010 or is irrelevant to any 404(b) analysis. Furthermore, the Motion for Reconsideration is profoundly unfair. The Motion lists conclusory assertions without elaboration or legal authority. Indeed, beyond the basic definition of negligent homicide, the Motion cites no decisional law at all. The prosecution's Motion thus puts the criminal defendant in the untenable position of attempting to divine and rebut unsupported and undisciplined legal conclusions, at

peril of losing a critical and well-reasoned ruling excluding inadmissible and prejudicial evidence. This posture is not only at odds with Rule 16.1(d), but also offends the criminal defendant's constitutional right to Due Process and a fair trial.

Second, Mr. Ray's Constitutional right to a fair trial on the charged offenses, in tandem with Arizona Rule of Evidence 403, bar the State's endeavor to reintroduce inadmissible evidence. The State's original theory was that Mr. Ray was reckless because he knew of alleged symptoms in prior sweat lodge ceremonies. The State now seeks to repackage that theory, and introduce all of the 404(b) evidence on which it rests, into a case for a *lesser* offense, all while still pressing the reckless manslaughter charges for which this same evidence is inadmissible. Subjecting a defendant to a full-scale prosecution only on a lesser offense, while exposing him to punishment for the greater offense, is repugnant to the Sixth Amendment promise of a fair trial. Not surprisingly, such an approach also runs afoul of Rule 403. The State's attempt would involve several *weeks* worth of prior-act testimony that has *no* legally probative value to the charged offense and has limited probative value to the potential lesser-included offense—an offense on which the jury will not be instructed unless the Court determines that the evidence supports the charge. *See State v. Ruelas*, 165 Ariz. 326, 328 (App. 1990) (instruction on negligent homicide is warranted only if "there is evidence from which the jury could convict on [that] lesser offense"). And the State's attempt is riddled with all of the heightened prejudice and fairness concerns attendant to the use of 404(b) evidence against a criminal defendant. *See, e.g.*, *State v. Terrazas*, 189 Ariz. 580, 584 (Ariz. 1997) (noting due process concerns).

In any event, the State's Motion fails on its merits, for its rests on a series of fundamental legal errors. The State advances three arguments for the relevance of the prior sweat lodge ceremonies: that they are "relevant to the mental state for negligent homicide," that they are "relevant to show the mental state of the participants and why they remained in the sweat lodge," and that they are relevant "to show Defendant's goal was to place people into an altered mental state, a classic symptom of heat stroke." Motion at 1, 3, 8. Each argument is meritless.

First, the State's argument that the prior ceremonies are relevant to the mental state of criminal negligence is foreclosed by the same flaw that barred the State's original motion: the

State has not shown and cannot show that the alleged symptoms at prior sweat lodges would signal—to Mr. Ray or to any reasonable person—a *substantial and unjustifiable risk that death would result*. *See* Under Advisement Ruling at 3 (holding that knowledge of the alleged pre-2009 symptoms "would not constitute notice that [Mr. Ray] allegedly was subjecting these participants to a *substantial and unjustifiable risk of death*" (emphasis added)). Both negligent homicide and recklessness manslaughter require such a showing. *See* A.R.S. §13-105(10)(c) (defining "recklessly"); *id.* §13-105(10)(d) (defining "criminal negligence").

The *only* new argument the State has provided since this issue was last briefed answers the wrong question. The State now posits that the alleged pre-2009 symptoms may be "points on the continuum of the progression from heat exhaustion to heat stroke" and that "heat stroke ultimately can result in death." Motion at 7–8.[1] But this assertion says nothing on the relevant question of whether, based on the alleged pre-2009 symptoms such as vomiting and shaking, individuals in a similar sweat lodge would be so likely to die that failure to perceive the risk of death would be "outrageous, heinous, [and] grievous." *State v. Far West Water and Sewer*, 224 Ariz. 173, 201 (App. 2010) (quoting *In Re William G.*, 192 Ariz. 208, 214–15 (App. 1998)). In fact, as explained in more detail below, the elaboration of the phrase "substantial and unjustifiable" and its relationship to criminal culpability in Arizona's case law makes clear that the State's showing is not even close to sufficient. The State's failure to show a substantial and unreasonable risk of death is dispositive of its current motion for reconsideration.

Although not necessary to the Court's decision, the State's criminal negligence argument fails for the additional reason that the State never explains how Mr. Ray could be criminally liable without knowledge of the alleged pre-2009 symptoms. Knowledge of those symptoms, it bears emphasis, is the sole reason the State alleges that a reasonable person would have perceived a substantial and unjustifiable risk of death. If the State's response is that Mr. Ray "should have"

[1] As noted below, these medical assertions, supported by no more than excerpts from hearsay statements, plainly do not meet the State's clear and convincing burden. As this Court explained in its February 3 ruling, the State could not demonstrate the relevance of the alleged pre-2009 symptoms in part because the State failed to come forward with "medical testimony or other substantial medical evidence." Under Advisement Ruling at 2. The State's Motion for Reconsideration repeats the same error.

discovered the alleged symptoms at prior sweat lodges, the State erroneously conflates vague notions of civil negligence with the criminal negligence required to prove the charged offenses.

Second, the State's argument that the prior sweat lodge evidence is relevant to the mental states of participants is as confusing as it is baseless. This argument appears to assert that participants stayed in the 2009 sweat lodge because, immediately before the ceremony began, Mr. Ray told participants that "he has been doing sweat lodges for years" and "did not disclose past problems." Motion at 3. This argument fails for at least four independent reasons:

(A) To the extent the State references participants' mental states in order to prove *Mr. Ray's* mental state, see Motion at 5 ("thus, the mental states of the participants is relevant to the question of whether Defendant acted recklessly or with criminal negligence), this argument is indistinguishable from the State's initial argument regarding Mr. Ray's mental state and fails for the same reasons. The State cannot show that a reasonable person would have perceived, based on the alleged pre-2009 symptoms, a *substantial and unjustifiable risk* that death would occur, and cannot show that Mr. Ray knew of the alleged pre-2009 symptoms.

(B) To the extent the argument is that statements by Mr. Ray in 2009 affected participants' behavior in 2009, such statements do not render the alleged *symptoms* in *prior* years relevant or admissible under Rule 404(b).

(C) As this Court has explained, participants' mental states are relevant to Mr. Ray's mental state only if the State can show that Mr. Ray knew that the participants possessed the particular mental state. *See* Under Advisement Ruling on Defendant's Motion in Limine (No. 2) re: Financial Condition, 1/13/11, at 5. The State has not done so.

(D) Legal defects aside, the State's factual basis for its account of participants' states of mind is perplexing. The State asserts that participants stayed inside the lodge because they did not know of the "past problems" such as vomiting and altered states, but also asserts that Mr. Ray *did* tell "participants they would experience nausea, vomiting, and altered states inside the sweat lodge." Motion at 3. This argument defeats itself.

Third, the State's argument that prior sweat lodge ceremonies are relevant to Mr. Ray's alleged goal of inducing altered states is irrelevant. Setting aside the factual inaccuracies and

distorted quotes on which the State bases its allegation of this "goal," the State's reasoning has no connection whatsoever to the 404(b) evidence. That defect bars any further consideration of the theory.

II. ARGUMENT

A. The State's motion is procedurally barred.

1. The State has not shown good cause to warrant reconsideration.

Arizona Rule of Criminal Procedure 16.1(d) provides that issues determined by the court "*shall not* be reconsidered" "[e]xcept for good cause" (emphasis added). To provide for a trial that comports with the Due Process requirement of fundamental fairness, this rule must not be an empty promise. Yet the prosecution here has fallen grievously short of a good cause showing.

The Motion for Reconsideration, it bears emphasis, seeks extreme judicial action. The State asks this Court to reverse a well-reasoned ruling that the Court reached after months of briefing, three full days of evidentiary hearings, and an evidentiary record spanning hundreds of pages and dozens of hours of audio tape. Moreover, the State seeks the extreme remedy of introducing prior-act evidence—evidence so widely accepted as prejudicial that it is the subject of a special rule whose "central purpose is to protect criminal defendants from unfair use of propensity evidence," *State v. Machado*, 2011 WL 519752, *3 (Ariz. Feb. 16, 2011) (discussing Ariz. R. Crim. P. 404(b)); is the subject of a heightened clear-and-convincing evidentiary standard, *see State v. Terrazas*, 189 Ariz. 580, 584 (1997), and mandates a special Rule 403 inquiry that tilts *against* admission, *see, e.g.*, *State v. Salazar*, 181 Ariz. 87, 91 (App. 1994) ("When the evidence concerns prior bad acts," the rules of evidence "have a different thrust, and the suppositional balance no longer tilts towards admission."). And the State rests this attempt on the novel and unsupported theory, discussed below, that evidence *already ruled inadmissible to the charged crime* can be used to conduct a trial-within-a-trial on a potential lesser offense.

In support of this motion, the State of Arizona comes forward with virtually nothing. Without any mention of its clear-and-convincing burden, the State supports its medical assertions with no more than selective excerpts of hearsay statements that were in the State's possession months before the three-day evidentiary hearing. The Defense could have tested these assertions

at the hearing and met the State's arguments with live witness testimony. Instead, months after the record in this matter was closed and after the start of trial, the Defense is now deprived of a meaningful opportunity for confrontation and rebuttal.

Worse, the State's Motion advances novel legal positions with little explanation and without *any citations to* authority. To take just one example, the State's argument in support of its heading "The prior sweat lodge ceremonies are relevant to the mental state for Negligent Homicide, a lesser included offense of Manslaughter," hinges on its assertion that "Defendant clearly failed to perceive a substantial risk that death would occur." Motion at 3. This is a *critical* legal conclusion that is necessary to the State's argument. Yet it is followed by no citation whatsoever, much less any decisional law interpreting the elements of negligent homicide or related legal analysis. This sort of Motion is profoundly unfair. The Motion shifts the burden to the criminal defendant to recreate legal arguments that are vague and unsupported, and then to rebut those arguments at peril of suffering the introduction of reams of prejudicial evidence. The Motion for Reconsideration thus flies in the face of both Rule 16.1(d) and the Due Process Clause, and it must be denied.

2. The State should not be permitted to try its case on a theory that pertains solely to a lesser included offense.

The State's attempt to try its case on a theory that pertains solely to a lesser included offense is fraught with yet further fairness concerns. The State has long argued that the existence of injuries at prior sweat lodges is *the reason* that the tragedy at the 2009 sweat lodge amounted to a crime of reckless manslaughter rather than an accident. As the County Attorney argued to this Court at the 404(b) hearing:

> "And that's how we prove that the defendant acted recklessly. In other words, I made this argument yesterday. ***But what separates what happened in 2009, what distinguishes it from a tragic accident and makes it a crime***? The answer is this state of recklessness. Having gone through the sweat lodges in 2005, 2007, 2008, having had — being made aware of what happens to people when you expose them to extreme heat, aware of that risk, chooses to consciously disregard it and then conducts a sweat lodge in 2009 that is even hotter, more intense, puts more pressure on his

> participants to stay inside. ***That's what makes this a crime***. That's what shows he acted recklessly."

Transcript of 404(b) hearing, Nov. 10. 2010 (statement of Ms. Polk).[2]

Because the Court has held that the prior sweat lodge ceremonies are not relevant or admissible to the charges of reckless manslaughter, the State now seeks to try the case on the same theory, using the same prior-act evidence, to prove *only* the lesser included offense of negligent homicide. The State has cited no legal authority, in the State of Arizona or anywhere else in the country, condoning this approach. Mr. Ray would effectively face a full-scale trial on negligent homicide based on evidence which has been ruled *irrelevant and inadmissible to the charged offense under Rule 404(b)*, yet Mr. Ray will continue to be exposed to the charged greater offenses and punishment. This arrangement is entirely inconsistent with the Sixth Amendment's promise of a fair trial. At the least, the State's Motion for Reconsideration lacks any legal justification for this dubious approach and must fail.

In any event, the State's attempt to occupy weeks of trial with 404(b) evidence relevant only to a lesser included offense cannot survive scrutiny under Rule 403, for the probative value of the evidence pales in comparison to its prejudicial effect. This Court has already established that the 404(b) evidence is not relevant to the reckless manslaughter charges, and as discussed below, the evidence has little or no relevance *even* to the lesser included offense of negligent homicide. Moreover, contrary to the State's assertion, the jury will *not* necessarily be instructed on negligent homicide. Arizona law calls for an instruction on a lesser included offense *only* if the evidence adduced at trial supports it. *See, e.g.*, *Ruelas*, 165 Ariz. at 328 (instruction on negligent homicide is warranted only if "there is evidence from which the jury could convict on [that] lesser offense").

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[2] The Detectives working on the case consistently gave the same explanation to the witnesses they interviewed. *See, e.g.*, Transcript of Interview of Lara Prieve, 12/22/09 (Diskin: Det. Diskin: "The question is whether or not the leader should have known that people could die based on prior problems and prior years, that's kinda the issue."); Transcript of Interview of Danielle Granquist, 2/14/10 (Diskin: "And so yeah, I guess the theory behind the charges was that James Ray should have known based on the prior sweat lodges that this was hurting people and he did it anyway.").

On the other side of the balance, the prejudice would be severe. The 404(b) evidence the State proposes would significantly alter the length and content of the trial. At last count, the State estimated that the lay-witness segment of its 404(b) case would consume two weeks of trial. In addition to these two weeks, an additional week or more would be necessary for the parties to call expert witnesses to prove the similarities or differences between the alleged symptoms suffered by each alleged participant in 2005 and 2008 and the deaths in 2009. This is the paradigmatic—and needless— trial-within-a-trial that Rule 403 seeks to avoid. *See, e.g., Brethauer v. General Motors Corp.*, 221 Ariz. 192, 197 (App. 2009) (precluding a video collage of seatbelt tests under Rule 403 because they would "'create a significant possibility of confusion and unfair prejudice to the defense and also the need for . . . mini trials with respect to what's similar and what's different'" between the circumstances in the video and the accident). To admit this mountain of irrelevant evidence would fly in the face of the long line of Arizona cases calling for heightened scrutiny under Rule 403 where 404(b) evidence is concerned. *See, e.g., Salazar*, 181 Ariz. at 91 ("When the evidence concerns prior bad acts," the rules of evidence "have a different thrust, and the suppositional balance no longer tilts towards admission."); *see also State v. Machado*, 2011 WL 519752, *3 (Ariz. Feb. 16, 2011) (the "central purpose" of Rule 404(b) "is to protect criminal defendants from unfair use of propensity evidence").[3]

B. <u>The prior sweat lodge ceremonies are not relevant to the mental state for negligent homicide.</u>

1. The alleged symptoms at prior sweat lodges do not confer notice of a substantial and unjustifiable risk of death for purposes of recklessness *or* criminal negligence.

This Court ruled earlier this month that the State failed to show that the alleged symptoms at pre-2009 sweat lodges provided notice of a substantial and unjustifiable risk of death for

[3] As noted in the Defense's earlier motions, Arizona courts have "repeatedly cautioned that" the "situations in which evidence sought to be introduced is more prejudicial than probative ... are very likely to arise in the prior bad act context." *State v. Anthony*, 218 Ariz. at 445 (quoting *State v. Ives*, 187 Ariz. 102, 111 (1996)). "The discretion of the trial judge under Rule 403 to exclude otherwise relevant evidence because of the risk of prejudice should find its most frequent application in th[e 404(b)] area." *State v. Taylor*, 169 Ariz. 121, 124 (1991) (quoting 1 Morris Udall et al., Arizona Practice: Law of Evidence § 84 (3d ed. 1991)).

purposes of Rule 404(b) analysis. *See* Under Advisement Ruling at 3. The Court's ruling remains correct and applies with precisely the same force to the State's new argument on negligent homicide. Negligent homicide, like reckless manslaughter, requires circumstances sufficient to put a person on notice of a ***substantial and unjustifiable risk that death will occur.*** The difference is that in reckless manslaughter, the defendant consciously disregards that risk of death, whereas in negligent homicide, the defendant fails to perceive the risk even though a reasonable person would perceive it. *See* State's Motion at 2; A.R.S. § 13-1102(A) ("A person commits negligent homicide if, with criminal negligence, the person causes the death of another person."); A.R.S. § 13-105(10)(d) ("'Criminal negligence' means with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive *a substantial and unjustifiable risk that the result will occur* or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."). The State's Motion for Reconsideration does not come close to showing the existence of a substantial and unjustifiable risk of death that would be evident to a reasonable person.

Examination of the meaning of "substantial and unjustifiable risk" under Arizona law, and its relationship to criminal liability as distinguished from civil liability, illuminates the abyss between the State's showing and the statute's requirements. The Arizona legislature, courts have held, "did not intend via section 13-105(9)(c) to criminalize acts or omissions amounting to no more than civil negligence." *In re William G.*, 192 Ariz. 208, 212–13 (App. 1997). Accordingly, in explicating the phrase "substantial and unjustifiable risk," courts have taken pains to "demarcate the border between criminal recklessness and civil negligence," lest a person be unconstitutionally punished for conduct that is not a crime. *See id.*

To begin, the phrase "substantial and unjustifiable" pertains to the "*degree* of risk"—*viz.*, the "probability" that the result will occur. *Id.* at 213–14; *Com. v. Ruddock*, 25 Mass.App.Ct. 508, 513 (Mass. App. 1988), cited in *In re William G,* 192 Ariz. at 214. And the probability must be high. A "substantial and unjustifiable risk" is <u>so</u> great that it is "'different in kind' from the merely unreasonable risk sufficient for civil negligence." *State v. Far West Water & Sewer*, 228

P.3d 909, 936 (Ariz. 2010) (quoting *In re William G.*, 192 Ariz. at 212). Moreover, for purposes of criminal negligence, the risk must be so obvious that the failure to perceive it is a "gross deviation from the standard of conduct." *Id.* A "gross deviation" requires conduct that is "'flagrant and extreme,'" "'outrageous, heinous, [and] grievous.'" *Id.* (quoting *William G.*, 192 Ariz. at 214–15).

The case law further provides that risks essentially fall into three categories. In the first category, there may be *a* risk that death will occur—this is true of almost any human activity—but death is not reasonably foreseeable. In such a case, no liability attaches. *See, e.g., Chavez v. Tolleson Elementary School Dist.*, 122 Ariz. 472, 478 (App. 1979) (student's abduction and death was not a foreseeable result of school's negligent supervision). In the second category, the risk of death is sufficiently likely as to be "unreasonable." In this category, civil liability attaches. *See, e.g., In re William G.*, 192 Ariz. at 214 (rough-housing in shopping cart in parking lot created unreasonable risk of damage to property); *Williams v. Wise*, 135 Ariz. 335, 343 (1970) (backing up a 60-foot truck in a construction zone where people were working may have been negligent). Criminal liability is possible only in the third category: the substantial and unjustifiable risk, a risk so great as to be *different in kind* from the unreasonable risk involved in civil liability. The case law clusters around those risks that are so patent and obvious that a reasonable person could not miss them. *See, e.g., Ruelas*, 165 Ariz. at 328 ("swinging a knife" "with enough force to drive [it] ten inches into [the victim's] body"); *State v. Valenzuela*, 194 Ariz. 404, 407 (1999) (shooting a person in the face); *State v. Cocio*, 147 Ariz. 277, 280 (1985) (driving after consuming "mass quantities of alcohol"); *Far West*, 224 Ariz. at 201 (flouting workplace regulations in spite of the "obvious and recognized health hazards" inherent in a sewage treatment facility).

The State's argument here cannot be reconciled with this body of law. To prevail, the State must take the position that a reasonable person who observes persons vomiting or disoriented in a given environment would not merely perceive *a* risk that persons in similar circumstances would die, and not merely an *unreasonable* risk of death. Instead, the State would have to argue, a reasonable person observing vomiting and the like would perceive that death was

so likely that it amounted to a different kind of risk altogether—a substantial and unjustifiable risk like swinging a knife, or shooting a person in the face, or purposefully violating OSHA requirements at a sewage plant. The State has made no such argument. Nor does the State cite any case law for its conclusory statement that "Defendant clearly failed to perceive a substantial risk that death would occur." Motion at 3.

In addition to having no foundation in law, the position the State would need to espouse runs counter to the available evidence and considerable human experience. As the court noted, the evidence at the *Terrazas* hearing reflected that JRI operated sweat lodges for seven years prior to 2009, with only a single participant receiving medical treatment—and that for a condition that was not life threatening. *See* Under Advisement Ruling at 2. And conducting a sweat lodge is not an activity that is obviously life-threatening. They have been conducted in different cultures for literally thousands of years. This is not the sort of record that can sustain an assertion of a substantial and unjustifiable risk of death. *Cf. William G.*, 192 Ariz. at 214 (noting that the risk of property damage could not be "substantial and justifiable" where two out of three individuals in the parking lot maneuvered the shopping carts in the same way as the defendant without incident, and the defendant himself only caused damage on his last "run").

2. The State's new medical assertions do not make the prior sweat lodge ceremonies relevant to criminal negligence.

The *only* "new" information the State advances in support of its criminal negligence argument is testimony from three doctors stating the general propositions that heat-related illnesses lie on a continuum, and that the pre-2009 symptoms the State alleges may constitute points on that continuum.

As an initial matter, the State's attempt to rely on these statements is procedurally defective. First, it comes too late. The doctors cited are the State's *own* witnesses, and their opinions were available to the State well in advance of the 404(b) evidentiary hearing. Indeed, two of the excerpts the State features in its motion come from interviews conducted by the Defense in June 2010. The State's delay in marshaling this argument is a reason to deny its motion for reconsideration. Furthermore, the State cannot introduce "evidence" by selectively

excerpting hearsay statements in a written motion. As this Court noted in its February 3 ruling, the State's arguments failed because the State had not introduced "medical testimony or other substantial medical evidence." Under Advisement Ruling at 2. The State still has not done so. And by making medical assertions only in the form of pull quotes in a legal argument—months after the live evidentiary hearing on this precise issue—the State unfairly denies the Defense an opportunity to confront the State's witnesses and introduce rebuttal evidence.

In any event, medical assertions do not assist the State in showing a substantial and unjustifiable risk of death. Instead, they address whether it is medically possible that the symptoms in prior years and the deaths in 2009 had any shared pathology. They do not answer whether the alleged symptoms would have signaled a *substantial and unjustifiable* risk of death to a reasonable person. For all the reasons stated above, the State cannot make such a showing under Arizona law.

3. The State has failed to prove that Mr. Ray had knowledge of the alleged pre-2009 symptoms.

The State's criminal negligence argument fails for a second and independent reason: the State never explains how Mr. Ray could be criminally liable without knowledge of the alleged pre-2009 symptoms. The State posits that "[e]ven if this Court continues to find that the State failed to show Defendant knew the prior participants were at a significant risk of death, given that Negligent Homicide is a lesser included offense, the prior sweat lodge ceremonies are clearly relevant in establishing the mental state of criminal negligence." Motion for Reconsideration at 8. The State offers no authority for this counterintuitive position. As a matter of law and logic, knowledge of the prior illnesses *is* necessary to the State's argument, whether the argument is based on negligent homicide or reckless manslaughter. It cannot be a gross deviation from the conduct of a reasonable person to fail to perceive a risk where the only basis for the perception of risk is information that the person does not have.

The State may respond that Mr. Ray's lack of knowledge of the alleged prior conditions was itself some vague form of "negligence," but that is an error of law. The only possible "negligence" at issue is the *criminal negligence* by which the State alleges that Mr. Ray caused

three deaths. *See* Defendant's Reply in support of Motion to Exclude Steven Pace, filed 2/14/11, at 4–5. Any possible wrongdoing associated with the failure to ascertain the alleged pre-2009 symptoms simply could not involve the "'flagrant and extreme,'" "'outrageous, heinous, [and] grievous'" conduct required under Arizona law. *Far West*, 224 Ariz. at 200 (quoting *William G.*, 192 Ariz. at 214–15). Moreover, such an omission would likely involve only JRI, the corporation organizing and hosting the retreat, and not Mr. Ray. And such issues implicate civil negligence, not criminal liability for homicide.

C. The prior sweat lodge ceremonies are not relevant to show the mental state of participants.

The State's argument that the prior sweat lodge evidence is relevant to the mental states of participants lacks any foundation. The State alleges that participants stayed in the 2009 sweat lodge because, immediately before the ceremony began, Mr. Ray told participants that "he has been doing sweat lodges for years" and "did not disclose past problems." Motion at 3. This argument fails for at least four independent reasons.

First, to the extent the State references participants' mental states in order to prove *Mr. Ray's* mental state, see Motion at 5 ("thus, the mental states of the participants is relevant to the question of whether Defendant acted recklessly or with criminal negligence), the prior sweat lodges could be relevant *only* to demonstrate that Mr. Ray consciously disregarded, or negligently failed to perceive, a substantial and unjustifiable risk that death would result in 2009. This argument is indistinguishable from the State's first argument regarding Mr. Ray's mental state, *see supra*, and fails for the same reasons: the State cannot show that a reasonable person would have perceived a *substantial and unjustifiable risk* that death would occur and cannot show that Mr. Ray knew of the alleged pre-2009 symptoms.[4]

Second, to the extent the argument is that statements by Mr. Ray in 2009 affected participants' behavior in 2009, such statements do not make the alleged symptoms in *prior* years

[4] The State's passing statement that "[e]vidence of the prior sweat lodge ceremonies is relevant to establish that Defendant misrepresented the risks involved to the 2009 participants," Motion at 5, is misplaced and legally undisciplined. This is a criminal homicide trial, not a fraud case.

material to the State's desired conclusion. The State indicates that "the participants entering the sweat lodge in 2009 had just been assured Defendant had been doing this for years and it was normal, if not the ultimate goal, to enter an altered state." Motion at 5. "This information," the State posits, "was important to the participants' decision to remain in the sweat lodge." Nothing in the causal sequence the State seeks to depict or the statements allegedly made by Mr. Ray has anything to do with, or is made more or less probative by, evidence of the alleged symptoms at pre-2009 sweat lodges.

Third, as this Court has explained, participants' mental states are relevant to Mr. Ray's mental state only if the State can show that Mr. Ray knew that the participants possessed the particular mental state. *See* Under Advisement Ruling on Defendant's Motion in Limine (No. 2) re: Financial Condition, 1/13/11, at 5. ("Logically, in order to prove recklessness, the State must also prove that the Defendant was aware of this mental state in the alleged victims and was aware that this mental state would subject the alleged victims to a substantial and unjustifiable risk of death."). The State says obliquely that "Defendant was aware of the mental state of mind of his participants, having placed them there intentionally through the events preceding the sweat lodge." Motion at 5. To the extent the State means to suggest that Mr. Ray was aware that participants would remain inside the sweat lodge point of death, this is an egregious distortion of the facts. In portions of the transcript that the State chooses not to feature, Mr. Ray tells participants that they can leave the sweat lodge and explains how to do so safely:

> I'm just going to tell you, my, one of my teachers taught me a long time ago, prepare for the worst, and expect the best. And my expectation, because I know what you can do. My expectation is that you're going to go through this like a samurai, and you're going to overcome whatever going on in your head . . .[5] Or whatever, else, you're going to transcend that and it's going to show you. It's going to give you a very powerful reference of what you're capable of doing. What you're really capable of doing. Now that being said, if you just get to a point where you just, you just you've got to leave, you just feel like you cannot, then a couple things-- is that please remember this is extremely hot in the center and many of you are going to be close to that.

[5] Expletive deleted.

> ***So if you have to leave, then you need to*** -- and you're right here, you can't duck out this way, you have to go all the way around and go out of lodge. Now after every round, we'll open the gate for more grandfathers. And sometimes I'll leave it open for a little while, just to let some fresh air in. And so, you cannot leave during a round, if you feel like you just cannot transcend and overcome this, then, when the gates are open, if you have to leave you leave and you leave very, very in a controlled manner. Very carefully, because there's legs and it's dark, there's legs and there's knees and there's elbows and, you know, the last thing we want is anybody in the pit. We've never had anyone in the pit. But just make sure you make your way around and you exit out of the lodge.

Fourth, legal defects aside, the State's factual basis for its account of participants' states of mind is perplexing. The State asserts that participants stayed inside the lodge because they did not know of the "past problems" such as vomiting and altered states, but also asserts that Mr. Ray *did* tell participants that "they would experience nausea, vomiting, and altered states inside the sweat lodge." Motion at 3. This apparently contradictory account disposes of itself.

D. <u>The State's mischaracterization of Mr. Ray's alleged "goal" has no connection to the prior sweat lodge ceremonies or the charged crimes.</u>

Finally, the State asserts that the evidence from prior sweat lodges "is relevant to show Defendant's goal was to place people into an altered mental state, a classic symptom of heat stroke." Motion at 8. This argument is meritless. The primary basis for the State's assertion of this "goal" is the audio recording of the briefing Mr. Ray gave just before the *2009* sweat lodge began. "Based on the [2009] briefing," the State claims, "it is clear that Defendant's goal was to place the participants in an altered mental state." *Id.* Ignoring the legal problems with relying on this "goal" to establish relevance, the theory simply has nothing to do with the prior sweat lodge ceremonies. The State's three-page discussion of Mr. Ray's alleged "goal" mentions a prior sweat lodge only once, and only to identify a hearsay statement whose connection to the State's "goal" theory is not apparent.

More fundamentally, this argument runs afoul of this Court's ruling that even "[a]ssuming that the Defendant was aware of the various signs and symptoms associated with pre-2009 participants, this knowledge would not constitute notice that he allegedly was subjecting these participants to a substantial and unjustifiable risk of death." Under Advisement Ruling on

Defendant's Motion in Limine (No. 1), at 3. Whatever the purported goal, the State has failed to establish "that the harm manifested by signs and symptoms associated with some pre-2009 sweat lodge participants was similar for purposes of Rule 404(b) analysis to the life-threatening and fatal conditions suffered by some participants in 2009." *Id.*

III. CONCLUSION

The State has moved for reconsideration without good cause, and now—in violation of Rule 403 and the promise of a fair trial—seeks to salvage its case through a prejudicial mini-trial on evidence with no relevance to the charged crimes. Even if the State could clear these procedural hurdles, its motion fails on the merits. The symptoms allegedly experienced by some participants at JRI sweat lodges in 2005 and 2008 are not relevant to the mental state of criminal negligence, to the mental states of participants, or to any purported goals of Mr. Ray. The State's effort to cloud this trial with irrelevant character evidence must once again be denied.

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